Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

No. 91-1890

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GERARD DAVID DUNWOODY,
U. ALICE ZIPLIES,
NATIONAL RESEARCH & MARKETING,
and CASTELWOOD CORPORATION,
Petitioners,

V.

EDN CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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May 22, 1992

QUESTION PRESENTED FOR REVIEW

Whether ownership of a copyrighted work is determined under the uniform federal "work for hire" test of the Copyright Act, or is determined under agency law of each particular state?

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Opinion of the Court Below

The opinion of the Superior court of Pennsylvania, entered August 29, 1991, is unreported and is reproduced as Appendix A.

Jurisdiction

On February 25, 1992 the Supreme Court of Pennsylvania denied petitioners' timely petition for allowance of appeal from the opinion of the Superior Court. This petition is filed within ninety days of that date. The Court has jurisdiction to review the opinion of the Superior Court of Pennsylvania under 28 U.S.C. § 1257.

Statutes and Regulations Involved

This case involves the United States Copyright Act, 17 U.S.C. § 101, *et seq.*, and in particular the "work for hire" provisions of § 201(b) of the Copyright Act, and the federal preemption provisions of § 301(a) of the Copyright Act. Sections 201 and 301 are reproduced as Appendix B.

Statement of the Case

This is a case in which ownership of a copyrighted work has been determined under state law, based solely upon evidence of an agency relationship between the parties. There is no dispute that petitioners are the authors of the copyrighted work. But the ownership of the copyrighted work was awarded to respondent pursuant to Pennsylvania agency law, and not the federal "work for hire" standard established under § 201(b) of the Copyright Act.

This case arises from the publication of "Home Health Care Resource" ("Resource"), a copyrighted directory of information and services for the physically disabled. "Resource" was published by petitioner Castelwood Corporation ("Castelwood"). Castelwood was formed by petitioners Gerry and Alice Dunwoody in 1983, shortly before Mr. Dunwoody terminated his contract with respondent EDN Corporation ("EDN") in September 1983. Dunwoody had performed services for EDN under a contract and as an independent contractor, through petitioner National Research & Marketing, by whom he was employed. The contract did not address copyrights, however.

EDN commenced an action in Pennsylvania state court one year after Dunwoody's departure, alleging that EDN owned "Resource" according to state-law theories of

agency and employment. EDN contended that Dunwoody was an employee of EDN and that he breached his fiduciary duty to EDN by publishing and distributing "Resource" through Castelwood, rather than EDN. Dunwoody contended that he was an independent contractor, not an employee of EDN, and that his written contract with EDN did not prohibit him from publishing "Resource" through Castelwood.

The matter was tried in 1988. The trial judge overruled petitioner's motion to dismiss under the Copyright Act and found, based on the evidence of an agency relationship between Dunwoody and EDN, that "'Resource' . . . belonged to EDN" as a matter of Pennsylvania state law. The Superior Court affirmed, and held that § 301 of the Copyright Act does not pre-empt the state-law claim for breach of agency.

Reasons for Granting the Writ

The state court has decided an important federal question in a way that directly conflicts with the Court's decision in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, (1989).

1. *The Importance of the Question*

The question of whether the federal "work for hire" provisions preempt state agency law is important to the enforcement of the Copyright Act, 17 U.S.C. §§ 101, *et seq*. The Court announced the test for application of the "work for hire" provisions, 17 U.S.C. § 201, in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). In *Reid*, the Court specifically recognized that the federal preemption provisions of the Copyright Act, 17 U.S.C. § 301, require application of a uniform, federal test of "work for hire." "Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national uniform copyright law by broadly preempting state statutory and common-law copyright regulation." 490 U.S. at 740.

But *Reid* did not expressly determine the application of the broad federal preemption of § 301 to the "work for hire" provision of § 201. Unless the broad provisions of § 301 pre-

empt competing claims of ownership of a copyrighted work based on state-law agency theories, like those asserted by respondent, then the Court's decision in *Reid* is seriously undermined and the objective of creating a national uniform copyright law is jeopardized.

2. *The Conflict with the Applicable Decision of this Court*

In *Reid*, the Court held that a dispute over ownership of a copyrighted work, when based on evidence of an agency relationship, is determined by federal copyright law, not state agency law:

> In past cases of statutory interpretation, when we have concluded that Congress intended terms such as "employee," "employer," and "scope of employment" to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms. This practice reflects the fact that "federal statutes are generally intended to have uniform nationwide application." *Establishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation*. See 17 U.S.C. § 301(a).

490 U.S. at 740 (citations omitted, emphasis supplied).

In *Reid*, as in this case, the issue was whether, based solely on evidence of an agency relationship between the parties, the copyrighted work belonged to the employer.[1] In *Reid*, an association claimed that a sculptor who created a copyrighted work was an employee of the association, and that therefore the association owned the work and the copy-

[1]The Court began its analysis by noting that under § 201 of the Copyright Act, 17 U.S.C. § 201(a), a copyright "vests initially in the author or authors of the work." 490 U.S. at 737. It was undisputed in *Reid* that the sculptor was the "author," just as EDN concedes that appellants are the authors of "Resource." The Court held that, under these circumstances, rights in a copyrighted work depend entirely upon the "work for hire" provisions of the Copyright Act; and *not* the "law of any particular State." 490 U.S. at 740.

right and had the exclusive right to its revenues. The district court agreed. 490 U.S. at 734. The sculptor, however, claimed that he created the work for the association as an independent contractor, and that he had the right to sell and distribute it. The circuit court agreed, and reversed the district court. *Id.*

The Court, however, reversed the circuit court under the "work for hire" provision of the Copyright Act. The Court announced the following test:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. See Restatement § 220(2) (setting forth a non-exhaustive list of factors relevant to determining whether a hired party is an employee). No one of these factors is determinative.

490 U.S. at 751-52. (footnotes and citations omitted).

But the state court below substituted Pennsylvania state law of agency for the agency test required by the Court in *Reid*, relying on § 301(b) of the Copyright Act:

> As the trial court noted, however, it is necessary to read § 301(a) of the Copyright Act in connection with the provisions of § 301(b) of the Copyright Act. The trial court specifically relied on § 301(b)(3) to support its view that appellee's claims are not preempted:

> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—
>
> * * *
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.
>
> 17 U.S.C. § 301(b)(3). Section 106 of the Copyright Act provides that a copyright is the right to exclude others from "reproducing," "distributing," "performing," or "displaying" copyrighted work. The trial court found that EDN's breach of agency, i.e. breach of Dunwoody's duty of loyalty, and misappropriation claims involve violations of rights that are distinct from the exclusive rights enumerated in § 106 of the Copyright Act and thus, not preempted by the Copyright Act.

Appendix A, p. A-2-3.

The Superior Court's analysis of § 301(b) cannot be reconciled with the Court's decision in *Reid*. If state-law agency theories are allowed to determine ownership of copyrighted work under the guise of "breach of agency" or breach of "duty of loyalty," then the policy of broad federal preemption recognized in *Reid* is reduced to semantics. While state courts may under § 301(b) adjudicate a written assignment of a copyright as a matter of state contract law, *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), *cert. denied*, 381 U.S. 915 (1965), the "work for hire" provisions of § 201 necessarily require application of federal test under the Court's decision in *Reid*. As the Court noted, § 201(b) expressly excludes the "work for hire" test if "there is a written agreement to the contrary." *Reid*, 490 U.S. at 737. In the absence of a written agreement, where the dispute over ownership of a copyright is based on evidence of the agency relationship between the parties, then the *Reid* test controls and preempts state law.

The *Reid* test is determinative of rights to a copyrighted work based upon the employment or agency relationship be-

tween the parties. Nothing could be clearer than the Court's language in *Reid*: "Establishment of a *federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the Act's express objective of creating national uniform copyright law by broadly preempting state statutory and common-law copyright regulation.*" 490 U.S. at 740 (emphasis added). All the facts adduced at the trial below concerning the employment relationship between the parties directly concern each of the *Reid* factors. *Reid* is controlling and the state-law agency test applied by the Pennsylvania Superior Court was preempted by the broad federal preemption of the Copyright Act.

Conclusion

This petition for certiorari should be granted and upon review, the opinion of the Pennsylvania Superior Court should be reversed.

Dated: Philadelphia, Pennsylvania
May 21, 1992

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APPENDIX A

EDN CORPORATION: *v.* GERARD DAVID DUNWOODY and U. ALICE ZIPLIES and NATIONAL RESEARCH & MARKETING and CASTELWOOD CORPORATION, **Appellants**	In the Superior Court of Pennsylvania **No. 02363 Philadelphia 1990**

Appeal from the Order Entered August 08, 1990 in the Court of Common Pleas of Montgomery County, Civil, No. 84-13697.

BEFORE: MONTEMURO, BECK and TAMILIA, JJ.

MEMORANDUM:

Defendant/appellant Gerard David Dunwoody worked for plaintiff/appellee Educational Development Network Corporation ("EDN") from 1981-1983. His wife, defendant/appellant U. Alice Ziplies, briefly worked as his assistant. Defendants/appellants National Research and Marketing ("NRM") and Castelwood Corporation ("Castelwood") are companies solely owned and operated by Dunwoody and Ziplies. In September of 1984 EDN filed a complaint contending that in 1983, while he was an exclusive agent/employee, Dunwoody, in concert with Ziplies, NRM and Castelwood, breached his duty of loyalty and fiduciary responsibility to it by taking business from one of its clients, Sears, Roebuck & Company ("Sears"), for himself. Specifically, EDN claimed Dunwoody, who had negotiated a contract between EDN and Sears for the publication of a Home Health Care Resource Catalogue, did not execute said contract but rather, replaced it with an identical contract between Castelwood and Sears. EDN's complaint also re-

quested equitable relief. The trial court, after a lengthy hearing, ordered appellants to account for all revenues they received from Sears relating to the Resource Catalogue contract they misappropriated from EDN. This timely appeal followed.

Appellants first contend that the trial court erred in concluding that EDN's claims were not preempted by federal copyright law. Appellants next contend that the trial court erred in its finding of fact that Dunwoody was an exclusive agent of EDN. Appellants also contend that the trial court erred in refusing to reopen the record to admit after discovered evidence of appellee's federal criminal convictions in an unrelated matter. After careful review, we find that each of appellants' claims are meritless. We therefore affirm the order of the trial court.

As to appellants' first claim, we find that the trial court did not err in concluding that appellee's claims were not preempted by federal copyright law. Federal copyright law is set forth in the Copyright Revision Act of 1976, 17 U.S.C. § 101, *et seq.* ("Copyright Act"). The preemption provision of the Copyright Act, § 301(a), preempts and abrogates all legal and equitable rights arising under the common law or state statutes that are equivalent to any of the exclusive rights within the general scope of copyright in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright. 17 U.S.C. § 301(a); *Sargent v. American Greetings Corp.*, 588 F.Supp. 912 (1984).

As the trial court noted, however, it is necessary to read § 301(a) of the Copyright Act in connection with the provisions of § 301(b) of the Copyright Act. The trial court specifically relied on § 301(b)(3) to support its view that appellee's claims are not preempted:

> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

* * *

> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

17 U.S.C. § 301(b) (3). Section 106 of the Copyright Act provides that a copyright is the right to exclude others from "reproducing," "distributing," "performing," or "displaying"" copyrighted work. The trial court found that EDN's breach of agency, i.e. breach of Dunwoody's duty of loyalty, and misappropriation claims involve violations of rights that are distinct from the exclusive rights enumerated in § 106 of the Copyright Act and thus, not preempted by the Copyright Act.

After careful review, it appears that EDN's claims are recognized by this Commonwealth and involve elements that distinguish them from copyright claims. *See Brignoli v. Balch Hardy & Scheinman, Inc.*, 645 F.Supp. (S.D.N.Y. 1986) (claim for violation of the duty of confidentiality not preempted by federal copyright law as it contained elements beyond those enumerated in 17 U.S.C. § 106); *Sargent v. American Greetings Corp., supra.* (claims for breach of confidential relationship and misappropriation not preempted by the Copyright Act). We will, therefore, not disturb trial court's conclusion that EDN's claims are not preempted by the Copyright Act on appeal.

Appellants next claim that the trial court erred in finding (a) that Dunwoody was an exclusive agent of EDN in his dealings with its client, Sears, and not an independent contractor as set forth in an agreement between himself and EDN, and (b) that Dunwoody's actions in replacing a contract between Sears and EDN with a contract between his company, Castelwood, constituted a breach of the duty and loyalty he owed to EDN. We disagree, initially noting that where the conclusions of a chancellor in equity are supported by the record, a reviewing court may not substitute its judgment for that of the chancellor. *Lower Frederick Tp. v. Clemmer*, 518 Pa. 313, 543 A.2d 502 (1988); *Harford Penn-Cann Serv. v. Zymblosky*, 378 Pa.Super. 578, 549 A.2d 208 (1988).

In the instant case, evidence in the voluminous record revealed the following: that in 1981, the President of EDN,[1] Gerald Kress, offered Dunwoody the position of a vice president; that Dunwoody accepted the offer requesting that for the first few months, he work part-time and, in a effort to conceal his pay from his creditors that he not be listed on EDN's payroll;[2] that within a few months, Dunwoody assumed his position full-time and EDN's staff considered him to be a regular, full-time EDN employee; that Dunwoody was compensated by EDN in the-same manner as all other EDN executives except, pursuant to his request, his name was not on EDN's payroll and no taxes were taken out of his pay; that after receiving and endorsing several paychecks, Dunwoody requested that his paychecks be made out to NRM, a name under which he and his wife often traded, in a further attempt to conceal his income from his creditors, and EDN complied; that Dunwoody did not register NRM with the State of New Jersey until four months after he began working for EDN; that while Dunwoody was

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[1]EDN is a Pennsylvania corporation engaged in the business of creating, publishing and distributing educational and informational publications of different types and on a variety of subjects which are utilized in programs involving their distribution and endorsement through third party professionals. Its clients, major national corporate consumer advertisers, such as Sears, pay for these publications. From 1981-1984 EDN employed approximately 20 employees, including sales personnel, whose responsibility it was to make sales calls and keep in contact with existing EDN advertisers, solicit new advertisers for existing programs, and identify the special needs of an existing or potential advertiser that would lead to the development of new EDN programs.

[2]On February 19, 1981, Dunwoody sent Kress a letter memorializing his understanding of the terms of his employment. In this letter Dunwoody stated the following:

> My job title will be 'Vice President—New Projects.' I will be responsible for the development of new business and new sources of revenue for EDN in publishing and related fields. I will be responsible for the conception, development and sale of these projects.

(N.T. 27-29, 255-265, 540, 798). This letter made no reference to NRM.

so employed by EDN, he held himself out to all clients and prospective clients that he was a vice president of EDN; that while at EDN Dunwoody was solely responsible for the Sears account and in such capacity, possessed the authority to negotiate, on behalf of EDN, contracts with Sears and oversee their fulfillment; that during the next year, at meetings between himself and Sears' representative, Joseph McNamara, Dunwoody held himself out as EDN's agent and that McNamara and other Sears' officials regarded him as such; that during these meetings Dunwoody successfully negotiated a contract for the publication of a booklet titled "Guide For Expectant Mothers" ("Guide"); that Dunwoody alone was responsible for coordinating all phases of production and distribution of the Guide and continued to meet with McNamara to update him on the progress of the Guide and to continue discussions of other possible programs, including a health care publication; that during one of these meetings, McNamara suggested that Sears was interested in having EDN produce a publication on home health care; that in Dunwoody's regular status reports to Kress, he made a reference to McNamara's suggestion, but then concealed his further pursuit of this idea; that during a later meeting with McNamara, Dunwoody informed McNamara that he was a non-exclusive agent for EDN and that he [Dunwoody] wanted to produce a health care publication for Sears; that beginning in late 1982 or early 1983, without Kress' knowledge, Dunwoody began to develop a proposal which he discussed with McNamara for the creation, publication, and distribution of a version of McNamara's proposed home health care publication, to be known as the Resource Catalogue; that during this period in time, EDN paid for all of Dunwoody's travel, entertainment and business expenses incurred during Dunwoody's meetings with McNamara; that during this time, Dunwoody, in a further attempt to shield his EDN pay from his creditors, drafted an agreement between himself and Kress documenting their relationship as one in which Dunwoody was an independent contractor who provided consulting services to EDN through NRM; that said consulting agreement, which was executed in 1983 but back-dated to 1981, did not produce any changes to

Dunwoody's actual relationship with EDN; that Dunwoody created and incorporated Castelwood in 1983, making him and his wife equal shareholders, in preparation for a meeting with Sears officials; that at said meeting Dunwoody made his first formal presentation to convince Sears officials to contract with Castelwood for the Resource Catalogue, telling them that Castelwood was also a publisher of educational and informational programs; that at the time, Castelwood did not have its own offices, using the address of Dunwoody's accountant as its mailing address; that as of 1985, Castelwood had only earned income as a result of the Sears contract; that in the summer of 1983, Castelwood and Sears executed the Resource Catalogue contract while Dunwoody was still a Vice President of EDN; that in the fall of 1983, Dunwoody resigned from EDN, neglecting to inform Kress that he had obtained a contract with Sears; that Dunwoody subsequently started work on the Resource Catalogue but later, in 1985, sold his proprietary rights in the Resource Catalogue to Sears, who then sought EDN to finish the work; and that Dunwoody's proposed publication of the Resource Catalogue was typical in content, use and distribution of EDN's publications. This is sufficient evidence to support the factual findings of the trial court.

Finally, appellants' claim that the trial court erred in refusing to permit the admission into evidence of alleged after-discovered evidence. The after-discovered evidence appellants point to is the federal criminal convictions of EDN and Kress for their improper dealings on other, completely different contracts between EDN and the National Guard. The convictions came after the hearing below.

After careful review, we find that the after-discovered evidence, namely, the subsequent federal criminal convictions of EDN and Kress, its president, was not directly related to the transaction upon which EDN seeks relief; it sought to impeach credibility, and was unlikely to change the result of the hearing. Therefore, we conclude that the trial court did not abuse its discretion in denying appellants'

motion to reopen testimony. *See Touraine Partners v. Kelly*, 333 Pa.Super. 196, 482 A.2d 240 (1984); *Freed v. Priore*, 247 Pa.Super. 418, 372 A.2d 895 (1977).

Order affirmed.

APPENDIX B

17 U.S.C. § 201, 301

§ 201. Ownership of copyright

(a) *Initial Ownership.*—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) *Works Made for Hire.*—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) *Contributions to Collective Works.*—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) *Transfer of Ownership.*—

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) *Involuntary Transfer.*—When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title except as provided under Title 11.

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.